RECORD AND BRIEFS

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No. 16-498

In the
Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PROFESSOR EDWARD A. HARTNETT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Edward A. Hartnett is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall University School of Law. Professor Hartnett teaches and writes in the fields of constitutional law and federal courts, and has an interest in the sound development of the law in those fields. He has also written on, and has a particular interest in, the proper interpretation of a decision at the center of this case: *United States v. Klein*, 80 U.S. 128 (1872).

SUMMARY OF ARGUMENT

Two Terms ago, this Court observed that *United States v. Klein* "has been called 'a deeply puzzling decision.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2538 (1998)). That was putting it mildly.[2]

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that this brief has been filed with the written consent of all parties. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1193 (calling *Klein* "confusing"); Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 323 (7th ed. 2015) (*Klein* "raises more questions than it answers"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L.J. 1, 34 (2002) (*Klein* is "sufficiently impenetrable that calling it opaque is a compliment"); Meltzer, *supra*,

Amicus submitted a brief in *Bank Markazi* asking the Court to clarify that *Klein* stands for the principle—and only the principle—that Congress cannot prescribe an unconstitutional rule of decision. Although the Court agreed that *Klein* stands at least for that principle, it was able to resolve *Bank Markazi* without deciding whether *Klein* also stands for something more. *See* 136 S. Ct. at 1324 n.19.

Petitioner and his *amici* now argue—as a number of the same *amici* previously argued in *Bank Markazi*—that *Klein* does stand for something more, and that the statute at issue in this case is therefore unconstitutional. *Amicus* submits this brief to reiterate why that interpretation over-reads *Klein*. Properly interpreted, nothing in *Klein* (or *Bank Markazi*) casts any doubt on the constitutionality of the statute at issue in this case.

ARGUMENT

I. *United States v. Klein* is correctly understood to prohibit statutes that prescribe unconstitutional rules of decision.

Although *Klein* is enigmatic, there is a broad scholarly consensus that it *at least* held that Congress lacks authority to decree a result that would violate a principle of constitutional law.[3] This Court

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at 2549 ("Much that is said in the opinion is exaggerated if not dead wrong . . . .").

[3] *See, e.g.*, Fallon et al., *supra*, at 298 ("[*Klein*] may be best read as resting on distinctive substantive grounds—that the measure required courts to render decisions that conflicted with the President's power to pardon."); Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in Federal Courts Stories 87, 109

agreed with that consensus in *Bank Markazi*, concluding that "commentators have rightly read *Klein* to have at least this contemporary significance: Congress 'may not exercise its authority, including its power to regulate federal jurisdiction, in a way that requires a federal court to act unconstitutionally.'" 136 S. Ct. at 1324 n.19 (quoting Meltzer, *supra*, at 2549) (brackets omitted).

The more controversial question is whether *Klein* has any additional "contemporary significance." *Amicus* submits that it does not. The principle that Congress cannot prescribe an unconstitutional rule of decision fully explains the result in *Klein*, and is thus the only principle that truly represents its holding.

In contrast, the interpretation of *Klein* proposed by petitioner and his *amici*—that Congress cannot direct the outcome of a pending case unless it purports to amend the underlying law (Pet. Br. 16-17; Fed. Courts Scholars *Amici* Br. 5-11 ("*Amici* Br.")))—does not explain the result in *Klein*. Congress did purport to amend the underlying law in the statute at issue in *Klein*, and the outcome thus cannot have turned on the principle advocated by petitioner and his *amici*. And while that principle is perfectly sound

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(Vicki C. Jackson & Judith Resnik eds., 2009) (*Klein* holds that Congress cannot "compel the courts to enforce an unconstitutional law or . . . be 'instrumental to that end'" (quoting 80 U.S. at 148)); Edward A. Hartnett, *Congress Clears Its Throat*, 22 Const. Comment. 553, 580 (2005) ("[Klein] holds that Congress lacks the authority to prescribe unconstitutional rules of decision." (emphasis omitted)); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 586 (2003) ("Perhaps the best understanding of *Klein*'s rule of judicial independence is that Congress cannot legislate so as to require courts to act unconstitutionally . . . .").

in the abstract, ascribing that principle to *Klein* would be pernicious because it would erroneously suggest that statutes purporting to amend the underlying law to the same extent as the statute in *Klein* are unconstitutional.

A. *Klein* held that Congress lacks authority to prescribe unconstitutional rules of decision.

1. *Klein* arose from a claim for compensation in the wake of the Civil War. Union officers had seized and sold Victor Wilson's cotton after the fall of Vicksburg.[4] By statute, the owner of seized property could recover the proceeds of its sale in the Court of Claims "on proof . . . of his ownership . . . and that he ha[d] never given any aid or comfort to the present rebellion." Act of Mar. 12, 1863, ch. 120, § 3, 12 Stat. 820, 820 ("1863 statute"). John Klein, the administrator of Wilson's estate, sought such relief.[5]

Wilson had been a surety on the bonds of two Confederate officers.[6] In *United States v. Padelford*, 76 U.S. 531 (1870), this Court held that such a suretyship constituted "aid and comfort to the rebellion within the meaning of" the 1863 statute. *Id.* at 539. Both Wilson and Padelford, however, had been pardoned under President Lincoln's proclamation of December 8, 1863. *Klein*, 80 U.S. at 131-32. Upon taking an oath of allegiance, that proclamation granted rebels "a full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened." Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863).

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[4] Young, *supra*, at 1192, 1198.

[5] Young, *supra*, at 1192.

[6] *Id.* at 1199.

Padelford held that the recipient of such a pardon—at least one who took the required oath prior to the seizure of his property—"was purged of whatever offence against the laws of the United States he had committed . . . and relieved from any penalty which he might have incurred." 76 U.S. at 543.

Consistent with *Padelford*, the Court of Claims held that Wilson's estate was entitled to recover. While the government's appeal to this Court was pending, Congress attempted to change the effect of a presidential pardon through a rider to an appropriations bill. *Klein*, 80 U.S. at 143. The rider made a pardon inadmissible to prove loyalty, made acceptance of a pardon (without protesting innocence) conclusive evidence of *disloyalty*, and provided that the Supreme Court, in cases in which the Court of Claims had already ruled in the claimant's favor based on a pardon, "shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 ("1870 statute").

2. Invoking the 1870 statute, the government moved to remand *Klein* to the Court of Claims with instructions to dismiss. 80 U.S. at 134. This Court rejected that request, held that the statute was unconstitutional, and affirmed the judgment of the Court of Claims. *Id.* at 145-48.

Chief Justice Chase's opinion for the Court first concluded that, as a statutory matter, the seizure of rebel property did not divest the owners of their title to the proceeds from that property. 80 U.S at 138. Instead, the government held the property as "trustee" for any owners who made the showing of loyalty required by the 1863 statute. *Id. Padelford* had already held that a pardon was sufficient evidence of

loyalty to satisfy the statute, and *Klein* held that the effect of Wilson's pardon was thus to give him an "absolute right" to the "restoration of the proceeds" from his property. *Id.* at 142.

The Court then held that the 1870 statute, which ostensibly nullified Wilson's right to recover by requiring the Court to dismiss, was unconstitutional. It explained that the statute withdrew the Court's jurisdiction "as a means to an end," and that its "great and controlling purpose [was] to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. The statute was not, therefore, "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* at 146. The Court also explained that it could not dismiss the case "without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* As a result, "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

The Court next concluded that "[t]he rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." 80 U.S. at 147. "[T]he legislature cannot," the Court explained, "change the effect of . . . a pardon any more than the executive can change a law," but "this [was] attempted by the provision under consideration." *Id.* at 148.

In a dissent joined by Justice Bradley, Justice Miller agreed with the Court that the 1870 statute was "unconstitutional, so far as it attempt[ed] to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President." 80 U.S. at

148 (Miller, J., dissenting). He nevertheless disagreed with the decision to affirm. Justice Miller disputed that Wilson had maintained title to his property after its seizure, and that he could therefore recover the proceeds by virtue of his subsequent pardon. *See id.* at 148-49. In the dissent's view, title had passed to the government at the time of seizure, and the pardon could not "restore that which ha[d] thus completely passed away." *Id.* at 150.

3. The principle that Congress lacks the authority to require the courts to apply an unconstitutional rule of decision—that "Congress may not compel the courts to speak a constitutional untruth"[7]—explains the result in *Klein*. The Court's holding that the 1870 statute was unconstitutional is adequately supported by the reasoning that (1) Congress lacks authority to prescribe an unconstitutional rule of decision, and (2) Congress had attempted to prescribe an unconstitutional rule of decision by instructing the Court to dismiss the case and deny recovery to Wilson's estate, a result that would have conflicted with the constitutional effect of Wilson's pardon.[8]

B. *Klein* need not be understood to adopt any broader principle.

Petitioner's *amici* do not dispute that *Klein* held that Congress has no power to instruct the courts to apply an unconstitutional rule of decision. Instead, they argue that *Klein* must also have held something

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[7] Meltzer, *supra*, at 2540.

[8] *See, e.g.*, Fallon et al., *supra*, at 325 ("the Klein judgment is adequately supported by . . . the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power").

more. That is because the opinion stated that the statute was "'*also* liable to just exception as impairing the effect of a pardon.'" *Amici* Br. 8 (quoting 80 U.S. at 147). That ruling, petitioner's *amici* assert, came after the Court had already identified "a standalone violation of Article III" and held that the statute "'passed the limit which separates the legislative from the judicial power.'" *Id.* (quoting 80 U.S. at 147). Petitioner's *amici* argue that it is necessary to give meaning to that holding as well.

This argument undoubtedly has force.[9] Ultimately, however, the principle that Congress has no authority to prescribe unconstitutional rules of decision explains *both* of the seemingly alternative holdings of *Klein*. That is because, properly understood, both holdings rested on the principle that Congress cannot prescribe an unconstitutional rule of decision. The Court issued alternative holdings only because it found two different reasons *why* the 1870 statute prescribed an unconstitutional rule of decision.

As all agree, one reason was that the statute impaired the effect of a pardon and therefore violated the President's constitutional authority. But the Court also found that the 1870 statute prescribed an unconstitutional rule of decision—and thus "passed the limit which separates the legislative from the judicial power" (80 U.S. at 147)—because it violated

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[9] *See Bank Markazi*, 136 S. Ct. at 1334 n.2 (Roberts, C.J., dissenting) (concluding that *Klein*'s ruling about "the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns").

the independent constitutional principle, extant at the time, that vested rights could not be destroyed.[10]

To understand why, it is helpful to consider the disagreement between the majority and the dissent. For the dissent, there was a critical distinction between a case such as *Padelford*, in which the rebel took the oath and was pardoned prior to the seizure of his property, and *Klein*, in which the rebel took the oath after the seizure of his property. Justice Miller's view was that, in *Padelford*, because "the possession or title of property remain[ed] in the party, the pardon or the amnesty remit[ted] all right in the government to forfeit or confiscate it." *Klein*, 80 U.S. at 150 (Miller, J., dissenting). But he concluded that, in *Klein*, because the property had "already been seized and sold, and the proceeds paid into the treasury," and because that meant (in his view) that title had already passed to the government, it followed that "the pardon [did] not and [could not] restore that which ha[d] thus completely passed away." *Id.*

The majority disagreed that title to Wilson's cotton had ever passed to the government. It emphasized at the outset that Wilson's cotton was defined by statute to be "captured and abandoned property," and that this statutory category of property was "known only in the recent war" and had no precedent in history. 80 U.S. at 136, 138. Unlike the dissent, the majority concluded that title to this "peculiar" form of property was not "divested absolutely out of

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[10] *See* Hartnett, *supra*, at 574-80; *cf.* Erwin Chemerinsky, Federal Jurisdiction § 3.2, at 1934 (6th ed. 2012) (explaining that the statute at issue in *Klein* could be understood both to infringe the pardon power and "unconstitutionally deprive[] [a person of] property without just compensation or due process," and thus to destroy a "vested right").

the original owners" when it was seized. *Id.* Rather, the property went "into the treasury without change of ownership," and the "government constituted itself the trustee for those . . . entitled to the proceeds" under the 1863 statute. *Id.* at 138.

From this perspective, once a property owner like Wilson took the required oath, "the pardon and its connected promises took full effect," and "[t]he restoration of the proceeds became the absolute right of the person[] pardoned." 80 U.S. at 142. Indeed, refusing to restore the proceeds as promised in the presidential proclamation would be a "breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom." *Id.*

This last reference was to the Emancipation Proclamation (Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863)), and it helps to clarify that the pardon played two distinct roles in the majority opinion in *Klein*. One role was to provide the basis for concluding that the 1870 statute "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." 80 U.S. at 147. The second role was to provide a mechanism by which a right was vested. In this second respect, there was nothing particularly distinctive about a pardon. Other legal instruments, such as the Emancipation Proclamation or a simple deed, also created vested rights.

The language of vested rights has largely fallen out of our federal constitutional discourse. But it was a dominant feature of the general constitutional law that federal courts developed in diversity cases dur-

ing the nineteenth century.[11] For example, in *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court ruled that Georgia's attempt to rescind a land grant was unconstitutional, explaining: "[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, [and] those conveyances have vested legal estate." *Id.* at 135. As Chancellor Kent put it, "[a] retrospective statute, affecting and changing vested rights, is very generally considered, in this country as founded on unconstitutional principles, and consequently inoperative and void."[12]

With this background in mind, it becomes evident that *Klein* held that the 1870 statute prescribed a result that was unconstitutional not only because it impaired the effect of a pardon, but also because it abrogated vested rights. Under more modern doctrine, this second violation might also be understood in due process terms, and *Klein* could be viewed as holding that the statute violated the Fifth Amendment because it purported to deprive a person of property without due process of law.[13] However it is framed, this second violation explains the Court's reasoning that Congress had "passed the limit which separates the legislative from the judicial power" by "prescrib[ing] a rule for the decision of a cause in a

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[11] *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tul. L. Rev. 1263, 1264-66, 1268-82 (2000).

[12] 1 James Kent, Commentaries on American Law 455 (O.W. Holmes, Jr. ed., 12th ed. 1873).

[13] *See, e.g.*, Chemerinsky, *supra* at 194 (describing this second aspect of *Klein* in terms of both due process and vested rights); Young, *supra*, at 1213-14 & n.136 (describing the vested rights problem in due process terms).

particular way." 80 U.S. at 146-47. As this Court explained in *Bank Markazi*, this language cannot be interpreted literally to mean that Congress can *never* prescribe a rule of decision for a pending case. 136 S. Ct. at 1324. Rather, the problem in *Klein* was a narrower one: Congress had prescribed an "*arbitrary* rule of decision" (80 U.S. at 146 (emphasis added)), namely, a rule of decision that violated the general constitutional law principle of vested rights.

The "vested rights" approach is further illustrated by the contrast that *Klein* drew with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). *Klein* explained that *Wheeling Bridge* did not involve a statute that prescribed an "arbitrary rule of decision." 80 U.S. at 146. In *Wheeling Bridge*, the Court employed traditional vested rights language to explain that, when a "private right[] [has] passed into judgment the right becomes absolute." 59 U.S. at 431. The Court held, however, that the rights at stake in *Wheeling Bridge* were public rights, and for that reason, Congress *could* prescribe a rule of decision that contradicted the Court's previous decision concerning those rights. *Id.*; *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) (McConnell, J.) (explaining the distinction between *Klein* and *Wheeling Bridge* in terms of the difference between public and private rights). Because the statute in *Wheeling Bridge* did not destroy any vested private rights, *Klein* concluded that the rule of decision in *Wheeling Bridge* was not an "arbitrary" one.

The vested rights approach also helps to solve another puzzle posed by *Klein*. The case involved a claim against the United States, and some rationale is needed to justify affirming a judgment against the United States despite its sovereign immunity and a

stated congressional policy to deny recovery.[14] The vested rights view provides that rationale: Because the claimant had a vested property right, and because Congress constituted the United States as trustee of the property, it seems to follow that Congress could not (or at least could not be understood to) divest that vested right by denying a forum in which to assert it.[15] This understanding is consistent with *Klein*'s statement that it is "not entirely accurate" to say that "the right to sue the government in the Court of Claims is a matter of favor," and that "[i]t is as much the duty of the government as of individuals to fulfil its obligations." 80 U.S. at 144.

Viewed in this light, *Klein* is similar to a case decided a few years earlier, *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864). In *Gelpcke*, the city of Dubuque had issued municipal bonds based on then-current understandings of Iowa law. The Iowa Supreme Court subsequently overruled its earlier decisions and held that Dubuque had no authority to issue the bonds. *See id.* at 205. This Court nevertheless held that the bondholders must be paid because the state-court decision could "have no effect upon the past." *Id.* at 206. Under "the law of this court," the destruction of rights acquired under a contract, valid when made, "would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal." *Id.* Although federal courts ordinarily followed state-court rules of decision regarding state law, this Court declared that it "shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

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[14] *See* Meltzer, *supra*, at 2539 n.12; Hartnett, *supra*, at 573.

[15] *See* Hartnett, *supra*, at 577.

Thus, in both *Klein* and *Gelpcke*, this Court refused to be bound by rules of decision, whether prescribed by Congress (*Klein*) or the state courts (*Gelpcke*), that violated the principle of general constitutional law that vested rights could not be destroyed. And, in *Klein*, this violation was an alternative reason why the 1870 statute prescribed an unconstitutional rule of decision.

Ultimately, therefore, this Court's reasoning in *Klein* took the following form: (1) Congress lacks the authority to bind courts to apply an unconstitutional rule of decision; and (2) the 1870 statute improperly sought to do just that (a) because it violated the general constitutional law principle of vested rights (or more modern principles of due process), and (b) because it also impaired the effect of a pardon. *Klein* thus issued alternative holdings only as to the reason why the statute sought to prescribe an unconstitutional rule of decision. The opinion need not be interpreted to adopt any other principle concerning Congress's authority to prescribe rules of decision.

C. The understandings of *Klein* advanced by petitioner and his *amici* are flawed.

Petitioner and his *amici* nevertheless urge the Court to adopt a broader interpretation of *Klein*. They argue that *Klein* stands for the principle that Congress cannot direct the outcome of a pending case unless it at least purports to "amend[] existing laws." Pet. Br. 16; *see also Amici* Br. 4.[16] This interpretation

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[16] This appears to be the position of petitioner and his *amici*, even though it is not exactly what they say. For example, *amici* state that, under *Klein*, "Congress may not direct the result in a pending case without amending the underlying law." *Amici* Br. 4. But if the problem in *Klein* was only that Congress did

would, on separation-of-powers grounds, limit Congress's authority to prescribe rules of decision in pending cases, even if those rules of decision would not violate any independent constitutional principle.

The principle advocated by petitioner and his *amici*, however, cannot explain the result in *Klein*. Congress *did* purport to amend the underlying law in the 1870 statute. Thus, *Klein*'s ruling that the 1870 statute was unconstitutional cannot have rested on the principle that purporting to amend the law is a necessary condition for a statute to be valid.

On its face, the 1870 statute purported to amend the law in numerous respects. For example:

- It provided that "no pardon or amnesty granted by the President . . . , shall be admissible in evidence . . . in support of any claim against the United States."
- It provided that the proof of loyalty required by prior statutes must be made "irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion."
- It provided that, in cases in which the Court of Claims had already entered

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not "amend the underlying law," that problem would be fully explained by the no-unconstitutional-rules-of-decision approach advocated here. Because Congress has no authority to prescribe an unconstitutional rule of decision, Congress *could not* have amended the law through the 1870 statute, and therefore necessarily failed to do so. We understand petitioner and his *amici*, however, to be making a different, broader point—that the statute in *Klein* was unconstitutional not only because it failed to amend the law due to a lack of congressional authority, but also because it did not even *purport to* amend the law.

> judgment in favor of a claimant "on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning" of the prior statutes, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."
>
> - It provided that, if a person accepted a pardon for participating in the rebellion without an express disclaimer of guilt, the "pardon and acceptance shall be taken and deemed . . . conclusive evidence" of disloyalty.

16 Stat. 235.

Although much of the statute employed the language of evidence, that is not itself constitutionally problematic because "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Moreover, it has long been recognized that conclusive presumptions are rules of law. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality op.) ("While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law.").[17] Indeed, so long as no independent constitutional bar-

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[17] *See also, e.g.*, 9 J. Wigmore, Evidence § 2492 (3d ed. 1940) (explaining that a "conclusive presumption" is, in fact, a "rule of substantive law").

rier is crossed, a rule of law is no less valid because it defines words (such as "loyalty") in unusual ways.[18]

In arguing that the statute in *Klein* did not purport to amend existing law, petitioner's *amici* rely on the passage in *Klein* in which the Court observed that the statute in *Wheeling Bridge* had created "new circumstances," whereas "no new circumstances" were created by the 1870 statute. 80 U.S. at 147; *see Amici* Br. 9. But that was a statement about the legal *effect* of the statute, not what it purported to do. The 1870 statute sought to create "new circumstances" by destroying vested rights and altering the effect of a pardon. The reason that the statute failed to create those "new circumstances" was that they were beyond Congress's authority to create. *See Bank Markazi*, 136 S. Ct. at 1324 ("The statute in *Klein* . . . attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.").

Petitioner's *amici* also rely on this Court's decision in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). *Amici* Br. 10-11. *Robertson*, however, did not suggest that the statute in *Klein* was an example of a statute that failed to purport to amend the law, or that *Klein* was decided on that basis. Instead, as petitioner's *amici* acknowledge (*id.* at 11-12), *Robertson* assumed without deciding that *Klein* requires that the law be amended. 503 U.S. at 441. The Court proceeded to resolve the case on the ground that the

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[18] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (rejecting the argument that "Congress' choice of statutory language can invalidate [an] enactment when its operation and effect are clearly permissible"); *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (like Humpty Dumpty, legislatures "are free to be unorthodox" in their use of language).

statute in *Robertson* did amend the law. *See id.* The Court therefore declined to reach the question whether *Klein* stands for the conclusion that petitioner's *amici* attribute to it here—namely, that the 1870 statute was unconstitutional because it did not purport to amend the law.

To be clear, *amicus* agrees with the principle that Congress cannot dictate the outcome of a pending case without amending the underlying law. Putting the point more precisely, Congress has the legislative power to amend the law—which includes the power to make new law that has a sufficiently clear application to a pending case that it effectively dictates the outcome of that case. Congress does not, in contrast, have the judicial power to render judgments in particular cases (apart from impeachment and elections), and it therefore oversteps its authority when it attempts to resolve a pending case without amending the law. *Amicus* also agrees that enforcing this boundary between the legislative and judicial powers "serves important separation of powers values." *Amici* Br. 12. Even so, respect for the other branches, as well as principles of constitutional avoidance, counsel in favor of interpreting a statute to amend the underlying law whenever fairly possible—which is what this Court did in *Robertson*. 503 U.S. at 441.

In any event, the critical point here is that the statute in *Klein* should not be understood as an *example* of a statute that did not purport to amend the underlying law. If the statute were erroneously understood in that manner, it would follow that any statute that is similar to the statute in *Klein* also does not purport to amend the law, and thus is equally unconstitutional. The danger posed by the position of petitioner and his *amici*, therefore, is that

it would lead to erroneous conclusions that statutes are invalid under *Klein*. That would give *Klein* a broader sweep than it warrants as a matter of *stare decisis*, and would give rise to unnecessary constitutional confrontations between the courts and Congress.

A counterfactual that is based on *Klein* illustrates the point. Suppose that, in 1870, Congress had been controlled by the Democrats rather than the Republicans. Suppose further that the Democrats believed, contrary to *Padelford*, that persons who had merely signed surety bonds for Confederate officers should not be treated as disloyal on that ground. If Congress had amended the law while cases brought by such persons were pending to declare that they were loyal for purposes of recovering under the 1863 statute, and that their claims should not be dismissed on the grounds of disloyalty, it is inconceivable that this Court would have found that statute unconstitutional and denied recovery. Yet petitioner and his *amici* would view this statute as having the same constitutional flaw as the statute in *Klein*.

Under a correct interpretation of *Klein*, there is no constitutional problem with this counterfactual statute because it does not prescribe an unconstitutional result. It does not attempt to force this Court to decide a case notwithstanding its view of the pardon power, destroy vested rights, or violate the Due Process Clause. This hypothetical illustrates that the true problem in *Klein* was not that the 1870 statute failed to purport to amend the law. It was instead that it purported to amend the law in a manner that prescribed an unconstitutional rule of decision.

D. *Bank Markazi* did not adopt a different understanding of *Klein*.

Nothing in *Bank Markazi* is to the contrary. As they argue here, petitioner's *amici* argued that the statute in *Bank Markazi* was unconstitutional under *Klein* because it directed the outcome of a pending case without purporting to amend the underlying law. But the Court held that the statute in *Bank Markazi* did amend the underlying law "by establishing new substantive standards." 136 S. Ct. at 1326.

The Court therefore resolved *Bank Markazi* without definitively ruling on the meaning of *Klein*. Its decision instead took the same form as its decision in *Robertson*: The Court held that, even assuming that *Klein* stands for the principle that Congress cannot direct the result of a pending case without purporting to amend the underlying law, the statute at issue was valid because it satisfied that principle. *See* 136 S. Ct. at 1326.

Indeed, petitioner's *amici* do not argue that *Bank Markazi* adopted their interpretation of *Klein*. They instead argue only that *Bank Markazi* did not rule out that interpretation. *Amici* Br. 17. That is true. But it is equally true that *Bank Markazi* did not rule out the interpretation of *Klein* advocated here. To the contrary, the Court hinted that, when push came to shove, it might ultimately agree that *Klein* stands for nothing more than the principle that Congress cannot prescribe an unconstitutional rule of decision. *See Bank Markazi*, 136 S. Ct. at 1324 n.19 (observing that "commentators have rightly read *Klein* to have at least" adopted this principle).

To be sure, as all members of the Court agreed in *Bank Markazi*, "Congress could not enact a statute

directing that, in 'Smith v. Jones,' 'Smith wins.'" 136 S. Ct. at 1323 n.17; *see id.* at 1334-35 (Roberts, C.J., dissenting). The majority reasoned that this hypothetical statute "would create no new substantive law; it would instead direct the court how preexisting law applies to particular circumstances." *Id.* at 1323 n.17. The dissent reasoned that this statute would change the law, but still would "constitute[] an exercise of judicial power" because it would be "tailored to one case" and express only a judgment "that one side in one case ought to prevail." *Id.* at 1335 (Roberts, C.J., dissenting). But whatever the reason that this statute would be invalid—and *amicus* agrees that it would be—it does not implicate *Klein*. Indeed, a statute providing only that "Smith wins" bears no resemblance to the statute in *Klein*, which purported to amend the law in several respects, and which directed dismissal for lack of jurisdiction of an entire category of cases, as opposed to directing a result on the merits in only a single pending case.

Bank Markazi therefore leaves open the conclusion that *Klein* held only that Congress lacks authority to prescribe unconstitutional rules of decision.

II. Neither *Klein* nor *Bank Markazi* casts any doubt on the constitutionality of the statute at issue in this case.

1. Properly understood, *Klein* does not suggest that the Gun Lake Act is unconstitutional. Petitioner and his *amici* do not argue that this statute prescribes an unconstitutional rule of decision. Nor could they. In providing that actions relating to the Bradley Property should be dismissed, § 2(b) of the Gun Lake Act does not even arguably deprive petitioner of a constitutionally guaranteed remedy. Petitioner does not contend, for example, that he owns

the Bradley Property and that § 2(b) therefore deprives him of any constitutionally required remedy for a taking. He instead challenges the government's acquisition of the Bradley Property based on the effect of the property's proposed use. Although Congress could authorize the federal courts to adjudicate this type of challenge, the Constitution does not require it to do so. Thus, petitioner cannot prevail under *Klein*.

2. Petitioner and his *amici* nevertheless argue that § 2(b) of the Gun Lake Act violates the separation of powers because it "decided Petitioner's case" without amending existing law. Pet. Br. 22; *see also Amici* Br. 22. That is incorrect. Section 2(b) is best understood to amend existing law by restoring the government's sovereign immunity against suits concerning the Bradley Property. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians Resp. Br. 15-26 ("Tribe Resp. Br."); Fed. Resp. Br. 23-27.

In its previous decision in this case, the Court held that the government had waived its sovereign immunity against petitioner's suit, but recognized that Congress could—and perhaps should—revisit that waiver through legislation. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 223-24 (2012). That is what Congress did in § 2(b) of the Gun Lake Act. It is true that the statute does not use the phrase "sovereign immunity." But it restores sovereign immunity by providing that actions concerning the Bradley Property "shall be promptly dismissed," Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1913 (2014), thus echoing the waiver of sovereign immunity in the APA, which provides that an action that otherwise satisfies the APA's terms "shall

not be dismissed" on the ground that it is against the United States. 5 U.S.C. § 702.

Particularly because § 2(a) of the Gun Lake Act ratifies the Secretary of the Interior's action in taking the Bradley Property into trust, § 2(b) is most naturally interpreted to insulate that ratified action from APA review by selectively withdrawing the APA's otherwise general waiver of sovereign immunity. In other words, § 2(b) reflects Congress's judgment that, having ratified the Secretary's action, APA review of that action would be pointless.[19]

If Congress had amended the APA to provide that an action "other than one relating to the Bradley Property" shall not be dismissed on the ground that it is against the United States, there would be no question that Congress had validly withdrawn its

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[19] Petitioner asserts that § 2(a) of the Gun Lake Act does not amend existing law because it ratifies the Secretary's action of taking the Bradley Property into trust. Pet. Br. 19-20. But ratifying executive actions—and thereby removing uncertainty over their legality—must count as a change in law for separation of powers purposes. In other words, amending the law in order to clarify it is an exercise of legislative power, not judicial power. Petitioner's *amici*, in turn, argue that the Gun Lake Act is invalid even if § 2(a) changes the law because a change in the law is constitutionally valid only if it "would be implemented by the *courts*," and § 2(b) prevents the courts from implementing § 2(a) by requiring dismissal of any suit that might implicate § 2(a). *Amici* Br. 18-19. The Constitution, however, does not require changes in the law to be implemented by the courts. Indeed, petitioner's *amici* cite no authority for that remarkable proposition. Moreover, the courts *do* implement § 2(a) when, pursuant to § 2(b), they dismiss suits challenging the Secretary's action of taking the Bradley Property into trust. In any event, these arguments ultimately do not affect the outcome of this case because, whether or not § 2(a) changes the law, § 2(b) does so by withdrawing the government's waiver of sovereign immunity.

waiver of sovereign immunity with respect to such actions. The same conclusion would follow if Congress had included language in § 2(b) of the Gun Lake Act providing that an action concerning the Bradley Property shall be promptly dismissed "on the ground that it is against the United States." Yet these hypothetical statutes are no different in effect than the version of § 2(b) that Congress enacted. The statute should therefore be understood to amend the law by withdrawing the government's waiver of sovereign immunity against suits concerning the Bradley Property. At the very least, the Court should adopt that understanding as a matter of constitutional avoidance. *See Robertson*, 503 U.S. at 441.

3. Petitioner's *amici* do not dispute that Congress could change the law in a manner that would result in dismissal of petitioner's suit (for example, by restoring sovereign immunity or withdrawing jurisdiction). *Amici* Br. 20-21. But they argue that § 2(b) does not amend the law, and thus is unconstitutional, because it explicitly instructs courts to "dismiss" such suits, rather than allowing courts to decide whether dismissal is the correct result. *Id.*

Nothing in the Constitution, however, prohibits Congress from enacting legislation stating that a certain class of cases should be dismissed. It is true that Congress has the power to make laws, as opposed to the power to render judgments in particular cases. But the exercise of the power to make laws will frequently control the judgments that must be entered in particular cases. In those circumstances, Congress does not violate the Constitution by spelling out the consequences of the laws that it enacts. That is particularly true when Congress is making clear that the enactment applies to pending cases.

For example, there is an existing circuit split on the question of whether the Alien Tort Statute categorically forecloses corporate liability. *See Jesner v. Arab Bank, PLC*, No. 16-499. Congress could resolve that question by enacting a statute providing both that the Alien Tort Statute forecloses such liability (or not), and that actions against corporations under the Alien Tort Statute shall therefore be dismissed (or not). Congress would not transgress any constitutional limitation by enacting the latter part of such a statute and making explicit what the first part of the statute makes implicit.

By the same token, a statute that reinstates (or waives) sovereign immunity is not invalid merely because it also provides that the result of that reinstatement (or waiver) is that certain actions shall (or shall not) be dismissed. Indeed, the contrary view embraced by petitioner's *amici* would call into question the validity of the waiver of immunity in the APA itself. After all, in providing that certain actions "shall not be dismissed," 5 U.S.C. § 702, the APA confers no more "latitude or discretion upon the federal courts" than § 2(b) of the Gun Lake Act. *Amici* Br. 20. Rather, both statutes "command[] [the courts] to take a specific action" (*id.*): dismissal (in the case of § 2(b)) or non-dismissal (in the case of the APA).[20]

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[20] Petitioner's *amici* suggest that the new legal rule in § 2(b)—that courts must dismiss actions "relating to" the Bradley Property—is also too clear to be constitutionally valid. *Amici* Br. 19-20 (arguing that, because "there is no question that this case qualifies as" an action relating to the Bradley Property, § 2(b) leaves no "meaningful opportunity for legal or factual analysis" or "room for judicial construction"). But "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Bank Markazi*, 136 S. Ct.

The same is true for numerous additional statutes that provide that certain classes of cases should be dismissed, including on immunity grounds. *See* Tribe Resp. Br. 22 & n.7 (citing examples); 22 U.S.C. § 254d ("Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed.").[21] These statutes confirm that, contrary to the view of petitioner's *amici*, there is nothing unusual or inappropriate about Congress including such language in the Gun Lake Act.

Section 2(b)'s directive to dismiss suits relating to the Bradley Property therefore does not render it

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at 1325. Moreover, the application of the new legal rule in § 2(b) may be less clear in other cases. For example, suppose a Michigan citizen were injured in a car accident on the Bradley Property, and he brought an action in federal court against the Ohio contractor who constructed the road for negligently altering the grade. It is not obvious whether that action would "relat[e] to" the Bradley Property for purposes of § 2(b). In such a case, the court would need to decide to what extent § 2(b), in addition to restoring the government's sovereign immunity, withdraws jurisdiction over suits between private citizens.

[21] *See also, e.g.*, 9 U.S.C. § 4 ("the proceeding shall be dismissed"); 12 U.S.C. § 5388(a) ("any case or proceeding . . . shall be dismissed"); 17 U.S.C. § 408(f)(4) ("An action . . . shall be dismissed"); 18 U.S.C. § 3162(a)(2) ("the information or indictment shall be dismissed"); 18 U.S.C. § 5036 ("the information shall be dismissed"); 22 U.S.C. § 2702(c) ("the case shall be dismissed"); 26 U.S.C. § 6226(b)(4) ("such action shall be dismissed"); 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); 48 U.S.C. § 1506 ("such suit shall be dismissed").

unconstitutional. If reinstating immunity is a constitutional change in the law—and everyone appears to agree that it is—the statute does not become unconstitutional merely because it effectuates that reinstatement by providing that any actions within the scope of reinstatement should be dismissed.

Petitioner's *amici* resist this conclusion by arguing that, if § 2(b) made a "change in law," it would be the same "'change in law' that this Court held to be unconstitutional in *Klein*." *Amici* Br. 22; *see also id.* at 10 (arguing that the problem in *Klein* was not that the statute "purported to withdraw the Supreme Court's appellate jurisdiction," and instead that "it proceeded to direct the Court to dismiss all pending appeals"). But the problem in *Klein* was that the 1870 statute prescribed an unconstitutional rule of decision, not that it instructed courts to "dismiss." Even if the statute in *Klein* had *not* required dismissal, and instead had provided only that the federal courts lacked jurisdiction over claims that relied on a presidential pardon, the statute still would have been invalid because it still would have prescribed a rule of decision that was unconstitutional.

Petitioner's *amici* also argue that § 2(b)'s instruction to dismiss particular cases unconstitutionally "deprive[s] the courts of jurisdiction to determine their jurisdiction." *Amici* Br. 21. That begs the question. If a jurisdictional statute prescribes an unconstitutional rule of decision, a court cannot obey it. Sometimes, as in *Marbury*, that means that a court cannot exercise jurisdiction, even though the statute says that it has jurisdiction. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (refusing to exercise jurisdiction because "an act of the legislature, repugnant to the constitution," does not "bind the courts, and oblige

them to give it effect"). And sometimes, as in *Klein*, the proper remedy for the constitutional violation is for the court to exercise jurisdiction, even when the statute instructs the court to "dismiss." *See* 80 U.S. at 145-48; *see also Boumediene v. Bush*, 553 U.S. 723 (2008).[22] In other words, a court is no more required to follow an unconstitutional rule of decision framed in terms of "dismissal" than it is required to follow an unconstitutional rule of decision framed in any other terms.

Under a correct reading of *Klein*, therefore, § 2(b) is not invalid merely because it instructs courts to dismiss a particular class of cases. Instead, the dispositive question is whether the statute prescribes an unconstitutional rule of decision. The statute in *Klein* did; the statute in this case does not.

4. Finally, petitioner and his *amici* argue that the Gun Lake Act is no different from the hypothetical "Smith wins" statute addressed in *Bank Markazi*. *See* Pet. Br. 17 (arguing that the Gun Lake Act "resembles th[is] hypothetical statute"); *Amici* Br. 2 (arguing that the statute here attempts to do "exactly" the same thing as the "Smith wins" statute). That is incorrect. As explained above, under the majority's approach in *Bank Markazi*, the problem with "Smith wins" is that it "would create no new substantive law." 136 S. Ct. at 1323 n.17. Here, § 2(b) creates new substantive law by restoring the government's sovereign immunity. Moreover, under the Chief Justice's approach in *Bank Markazi*, the problem with

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[22] The remedy of exercising federal jurisdiction, in both *Klein* and *Boumediene*, can be explained on severability and statutory construction grounds. Fallon et al., *supra*, at 1203 (explaining *Boumediene*); Hartnett, *supra*, at 576 n.129 (explaining *Klein*).

"Smith wins" is that it would be "tailored to one case" and express nothing more than a judgment "that one side in one case ought to prevail." *Id.* at 1335 (Roberts, C.J., dissenting); *see also id.* at 1336 (distinguishing *Robertson* and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), because those cases did not concern statutes directed to a single case). Here, § 2(b) is not limited to a single case, and instead applies to *any* case concerning the Bradley Property. Under the approaches of both the majority and the dissent in *Bank Markazi*, therefore, § 2(b) is a valid exercise of the legislative power.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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